

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

J. FELIX ARANDA

Claimant

VS.

ACME FOUNDRY, INC.

Respondent

Self-Insured

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Docket No. 1,009,171

ORDER

Respondent appeals the June 12, 2006 Award of Special Administrative Law Judge Marvin Appling. The Appeals Board (Board) heard oral argument on September 26, 2006.

APPEARANCES

Claimant appeared by his attorney, William L. Phalen of Pittsburg, Kansas. Respondent, a self-insured, appeared by its attorney, Paul M. Kritz of Coffeyville, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Special Administrative Law Judge (SALJ).

ISSUE

What is the nature and extent of claimant's injuries?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the SALJ should be modified to award claimant a 17 percent permanent partial disability to the right upper extremity at the level of the shoulder.

Claimant had worked for respondent for over four years, when on August 22, 2002, while breaking pieces of metal with a 12-pound hammer, he felt his right arm pop. Claimant experienced pain from his shoulder into his neck and from his elbow down his arm. Respondent was notified, and medical treatment was provided. This treatment

included a referral to orthopedic surgeon Erwin Howell, M.D. Dr. Howell ordered an EMG, which showed a partial thickness rotator cuff tear in the right shoulder.

Claimant was then referred to orthopedic surgeon Pat Do, M.D., in Tulsa, Oklahoma. Dr. Do performed an arthroscopic debridement of the biceps tendons, a subacromial decompression and a mini open rotator cuff repair. Claimant was then referred to six weeks of physical therapy. After physical therapy, claimant was returned to work with restrictions, which respondent has been able to accommodate. As claimant has been returned by respondent to accommodated employment which pays a comparable wage, his entitlement to an award is limited to a functional disability award.¹

Claimant has been referred to three health care professionals for medical examinations. The first examination was with Pedro A. Murati, M.D., board certified in physical medicine and rehabilitation. Dr. Murati examined claimant at claimant's attorney's request on February 16, 2004. Dr. Murati diagnosed claimant with right shoulder pain post subacromial decompression, right carpal tunnel syndrome and myofascial pain syndrome affecting the right shoulder and cervical and thoracic spine. Claimant was rated at 10 percent to the right upper extremity for the shoulder surgery, 4 percent to the right upper extremity for the loss of range of motion in the shoulder and 10 percent to the right upper extremity for the carpal tunnel syndrome. These combine for a 22 percent permanent partial disability to the upper extremity. Dr. Murati also rated claimant at 5 percent of the whole person for the myofascial pain syndrome involving the cervical spine, and 5 percent of the whole person for the myofascial pain syndrome of the thoracic spine. All combined, claimant was assessed a 21 percent permanent partial disability to the whole body for the injuries suffered on August 22, 2002. All results and ratings were pursuant to the fourth edition of the *AMA Guides*.² Dr. Murati, who is fluent in Spanish, had no problem communicating with claimant.

Claimant was next examined and rated by board certified orthopedic surgeon Edward J. Prostic, M.D. This examination, also at the request of claimant's attorney, occurred on September 7, 2004. Dr. Prostic rated claimant at 20 percent to the right upper extremity at the shoulder for the shoulder and biceps tendon surgeries and the right carpal tunnel syndrome, with these ratings being pursuant to the fourth edition of the *AMA Guides*.³ Dr. Prostic testified that claimant had no complaints in the area of the thoracic spine, and, therefore, he did not examine it. He did examine the cervical spine but found no abnormalities. He looked for trigger points but found none. He agreed that he was not prone to diagnose myofascial pain syndrome. He stated that he only used that diagnosis

¹ K.S.A. 44-510e.

² American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

³ *AMA Guides* (4th ed.).

about once every five years. Dr. Prostic testified that he speaks a little Spanish and also claimant's bilingual daughter was present at the examination. He had no trouble communicating with claimant.

Claimant was examined at respondent's request by board certified neurological surgeon Paul S. Stein, M.D., on July 12, 2005. Dr. Stein testified that he had a Hispanic interpreter present. He had no problem communicating with claimant. Dr. Stein found claimant to be at maximum medical improvement for the shoulder injury, assessing claimant a 2.5 percent impairment to the right upper extremity, which he later rounded up to 3 percent. His examination of claimant's upper extremity found numbness and tingling in the right hand. He recommended an additional EMG. But when shown the NCT report from January 9, 2003, he determined that claimant had a 5 percent impairment to the right upper extremity for the carpal tunnel syndrome. His ratings were also pursuant to the fourth edition of the *AMA Guides*.⁴ He examined claimant's cervical spine, finding no trigger points in the cervical midline or paraspinal musculature. He did not examine claimant's thoracic spine.

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.⁵

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.⁶

In this instance, claimant has been found to have suffered permanent disability to his right upper extremity by all three examining physicians. The ratings vary, but the overall diagnosis and conclusions are similar. The significant variation in diagnoses is contained in the report of Dr. Murati. The findings of myofascial pain syndrome by Dr. Murati are refuted by both Dr. Prostic and Dr. Stein. Both testified to having tested claimant's cervical spine for trigger points. None were found. Even Dr. Prostic, claimant's hired expert, was unable to verify the existence of myofascial pain syndrome, although he did say the symptoms could wax and wane.

The Board finds claimant has satisfied his burden regarding the injuries to his right upper extremity, but failed regarding the alleged injuries to his cervical and thoracic spine. The Board, therefore, modifies the award to grant claimant a 17 percent permanent partial disability to his right upper extremity at the shoulder for the injuries suffered on August 22,

⁴ *AMA Guides* (4th ed.).

⁵ K.S.A. 44-501 and K.S.A. 2002 Supp. 44-508(g).

⁶ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

2002. This rating is based upon an averaging of the rating opinions of the three testifying experts contained in this record.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge Marvin Appling dated June 12, 2006, should be, and is hereby, modified to award claimant a 17 percent permanent partial disability to the right upper extremity at the level of the shoulder. Claimant is awarded 3 weeks of temporary total disability at the rate of \$332.53 in the sum of \$997.59, followed by 37.74 weeks of permanent partial disability at the rate of \$332.53 in the amount of \$12,549.68, for a total award of \$13,547.27, all of which is due and owing and ordered paid in one lump sum, minus any amounts already paid.

The record does not contain a filed fee agreement between claimant and his attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant to the ALJ for approval.

IT IS SO ORDERED.

Dated this ____ day of October, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Paul M. Kritz, Attorney for Respondent
Marvin Appling, Special Administrative Law Judge
Thomas Klein, Administrative Law Judge